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Name: Jerry A. Archuleta

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District Court

APPLICATION

PERSONAL

1. Full Name	Jerry Anthony Archuleta			
2. County of Residence	Santa Fe			
3. Birthplace	Los Alamos, NM			
4. If born outside the US, give the basis for your citizenship	N/A			
5. Birth Date	[REDACTED] 1970			
6. Marital Status	Married			
7. If married, list spouse's full name	Tara Elizabeth Block Archuleta			
8. Spouse's occupation	Business Venture Officer/Century Bank			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
12/2001-still	3010 Sandia Circle	Santa Fe	NM	87507

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Paramount High School 1984-1988, General Education
College(s)	University of Phoenix 2002-2008, BS Crim Justice, MBA Capella University 2011- still, PhD in Psychology Candidate
Law School(s)	University of New Mexico, 8/2008-5/2011, JD

12. Bar Admissions and Dates	New Mexico State Bar, September 2011.
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EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	8/2013-still
Employer	Jerry A. Archuleta Law Firm P.C.
Mailing Address	3010 Sandia Circle
Business Phone	505-316-4757
Position	Owner/Attorney

Duties	Responsible for all intake of cases, paperwork with cases, supervision of legal assistants, manage trust accounts, billing and collections of accounts, and file management.
Supervisor	N/A

13. List Your Present Employment

Date(s) of Employment	6/1996-still
Employer	Santa Fe Sting Football Team
Mailing Address	3010 Sandia Circle
Business Phone	505-316-4757
Position	Owner/Coach
Duties	Multitask to complete paperwork, organize personnel and delegation of assignments for seasonal requirements, organize the yearly board of directors from the players and assign the team captains, work out necessary contracts with school district and officials, maintain inventory of necessary equipment, develop seasonal schedule of games and conduct fundraising and advertising for the team.
Supervisor	N/A

13. List Your Present Employment

Date(s) of Employment	8/2004-still
Employer	Archuleta Real Estate LLC
Mailing Address	3010 Sandia Circle
Business Phone	505-316-4757
Position	Owner/Qualifying Broker
Duties	Hire and supervise all employees of the company, conduct the sale of residential and commercial properties and property management to include preparing and explaining the contractual obligations of the parties, develop advertisement for all properties listed with the company, oversee all legal paperwork necessary for all company business, schedule listings of client's property and operate Microsoft Office products.
Supervisor	N/A

13. List Your Present Employment

Date(s) of Employment	8/2013-still
Employer	Santa Fe Community College
Mailing Address	6401 Richards Ave, Santa Fe, NM 87508
Business Phone	505-428-1689
Position	Adjunct Professor
Duties	Responsible for develop curriculum and teaching the following courses: Criminal Investigation, Court Survival, Report Writing, American Correctional Systems, First-line supervisor, Cybercrime, Criminal Law and Procedure and Law Enforcement Supervisor.
Supervisor	Jerry Trujillo

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	2/2013-8/2013
Employer	New Mexico Corrections Department
Mailing Address	P.O. Box 1059, Santa Fe, NM 87504-1059
Business Phone	505-827-8201
Business FAX	505-827-8283
Employer's Email Address	NMCD-Inquires@state.nm.us
Position	Administrative Law Judge

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	8/2011-2/2013
Employer	Second Judicial District Attorney's Office
Mailing Address	520 Lomas Blvd NW, Albuquerque, NM 87102
Business Phone	(505) 222-1099
Business FAX	505-241-1099
Employer's Email Address	N/A
Position	Assistant District Attorney

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	6/2009-6/2011
Employer	First and Second Judicial District Attorney's Office
Mailing Address	520 Lomas Blvd NW, Albuquerque, NM 87102
Business Phone	(505) 222-1099
Business FAX	505-241-1099
Employer's Email Address	N/A
Position	Student prosecutor

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	8/2002 – 8/2008
Employer	Protection Technology Los Alamos/SOC
Mailing Address	Los Alamos National Laboratory
Business Phone	(505) 665-4134
Business FAX	505-665-4100
Employer's Email Address	info@soc-usa.com
Position	Security Police Officer/Firearms Instructor/Special Response Team Instructor/Captain

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	8/1991 – 8/2002
Employer	Santa Fe Police Department
Mailing Address	2515 Camino Entrada, Santa Fe, NM 87505
Business Phone	(505) 428-3710
Business FAX	N/A
Employer's Email Address	N/A
Position	Police Cadet-Lieutenant

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	1988 – 1991
Employer	Paramount Unified School District
Mailing Address	15110 California Ave, Paramount, CA 90723
Business Phone	(562) 602-6000
Business FAX	N/A
Employer's Email Address	N/A
Position	Staff Assistant

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	1988
Employer	California Krush
Mailing Address	UNK – Company closed several years ago
Business Phone	None
Business FAX	None
Employer's Email Address	None
Position	Computer Programmer

Note: No. 14 is a separate table, which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:
Answer 15: None

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?
Answer 16: 4 years of private practice.
17. How extensive is your experience in Commercial Law?
Answer 17: 4 years of private practice.
18. How extensive is your experience in Domestic Relations Law?
Answer 18: 6 years of practice as an attorney and 11 years as a police officer
19. How extensive is your experience in Juvenile Law?
Answer 19: 6 years of practice as an attorney and 11 years as a police officer
20. How extensive is your experience in Criminal Law?
Answer 20: 6 years of practice as an attorney and 11 years as a police officer
21. How extensive is your experience in Appellate Law?
Answer 21: Limited experience while in law school.
22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.
Answer 22: Approximately 60 cases. 1 in the last two years involving a DWI case.
23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.
Answer 23: 140 bench trials. 10 in last two years involving family law cases and DWI cases.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: 4 appeals. 3 appeals in the last two years.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates

Public Office	Dates
New Mexico Criminal Defense Lawyers Assoc.	8/2014-still

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
NMCDLA	Member	8/2014-still

27. Activities in civic organizations, including offices, held, for last 10 years

Civic Organization	Position Held	Dates
Santa Fe Sting Football	Owner/Coach	8/1996-still
Veterans Law Club	President	8/2007 – 5/2008
ACLU	President	8/2006 – 5/2007

28. Avocational interests and hobbies

Answer 28: High School Football Coach, Children's league football coach, Adjunct Professor (SFCC)

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.

Answer 29: No

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify

Answer 30: No

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

Answer 31: No

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: No

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

Answer 33: No

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).

Answer 34: I have been involved as a defendant in lawsuits when I was an officer. The nature ranged from excessive force complaints to failure to do my job. All lawsuits were dismissed against me.

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

Answer 35: No

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?
Answer 36: N/A
37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?
Answer 37: N/A
38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.
Answer 38: Yes.
39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.
Answer 39: Yes. I was involved in a bad car accident in March of 2013 and I was unable to work for a substantial amount of time. I filed bankruptcy in August of 2014.
40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:
Answer 40: Jerry A. Archuleta Law Firm P.C. Archuleta Real Estate LLC and Santa Fe Sting Football
41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.
Answer 41: No
42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.
Answer 42: Yes. I am older than 35 years of age, I had lived in First Judicial District for 26 years and I will have been practicing law for 8 years in September of 2017. I have two years of practicing law as a law student under the supervision of a licensed attorney.
43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.
Answer 43: I have dedicated my law to public service by being a police officer for 16 years and then as an Assistant District Attorney for 3 years. Serving as a judge will allow me to continue to serve my community and make it better. I have also had the pleasure of seeing several judges in the First Judicial District Court since 1991. I have learned a lot from great judges for the last 26 years as I observed cases on my day off as an officer and then as a law student and attorney.
44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?
Answer 44: Yes

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.

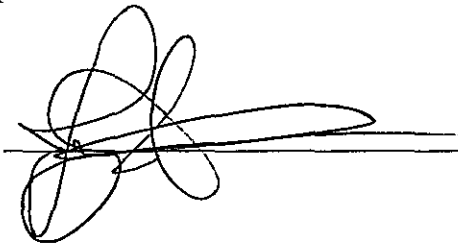
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written, which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, written over a horizontal line.

Date:

22 AUG 17

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

FILED
FIRST JUDICIAL
DISTRICT COURT
2015 NOV 18 PM 3:53

ROSANNA SINGARELLA,
PLAINTIFF,

vs.

No. D-101-CV- 2015-01731

FIRST SERVE PRODUCTIONS, LLC.
JERRY HANKS,
ROGER CASCIANI
EACH BEING A MEMBER
OF FIRST SERVE
PRODUCTIONS, LLC

DEFENDANTS.

**MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON
WHICH RELIEF CAN BE GRANTED WITH SUPPORTING
AUTHORITIES**

COME NOW, Defendants, First Serve Productions, LLC (hereinafter
"FSP" or "First Serve"), Jerry Hanks, Roger Casciani, by and through their
undersigned counsel, Jerry A. Archuleta, and file this their Motion to Dismiss
and as grounds therefore state as follows:

**SECTION I
PROCEDURAL STATUS**

Plaintiff's Complaint is against a limited liability company and its
members. With the exception of Defendants Hanks and Casciani, the
remaining Defendants reside outside of New Mexico. Affidavit of Jerry Hanks
at paragraph 6 (attached as Exhibit A to this Motion). This Motion is brought
at this time by FSP and Defendants Hanks and Casciani as they are the only

ones who arguably have been properly served. Upon information and belief, Plaintiff's counsel claims that she has achieved proper and valid service on at least one or perhaps two out of state Defendants. This is stated on an informed and belief basis because undersigned counsel and Defendant Sandoval, who intends to appear *pro se* at the appropriate time, have been attempting to ascertain from Plaintiff's counsel the identity of all those she claims she has served to no avail. Plaintiff's counsel has refused to provide them this information and has failed to file any returns of service as of the date of this filing. The last request for this information was yesterday and it went without a response from Plaintiff's counsel. As such, the position of the other Defendants is that they have not been properly served outside of New Mexico and that this Motion should not be deemed to be a general appearance on their behalf. They stand ready to challenge service or to defend this action once Plaintiff's counsel files, if at all, any returns claiming that she has achieved service. Nevertheless, FSP argues for the dismissal of all its individually named Members as is more fully set forth below.

SECTION II INTRODUCTION

Though Plaintiff asserts a total of eight (8) claims, all of them are fatally flawed and must be dismissed. First, all but Plaintiff's first claim are barred by their respective statutes of limitation. Second, the claims against the individual Defendants must be dismissed on the basis that limited liability law shields them from personal liability. Third, Plaintiff's claim on

the promissory note must be dismissed because the Note itself makes clear that it has not yet matured. The remaining claims must also be dismissed because Plaintiff has failed to even allege the most basic factual and elemental bases for such claims. Plaintiff and her counsel are also subject to sanctions and attorneys' fees for having brought a series of such baseless claims. See Section IV, below.

Given the nature of this Motion, Defendants did not seek Plaintiff's consent before its filing. Some relevant communication with Plaintiff's counsel is addressed in the Section III, which requests sanctions.

SECTION III ARGUMENT

Point ONE: A Court May Dismiss Claims Which Have No Legal Basis

In considering a motion to dismiss a court is to deem all well-pled allegations as true. Valdez v. State, 2002-NMSC-028, ¶ 4, 132 N.M. 667. However, if such allegations do not provide sufficient factual and legal sufficiency to give rise to claims, such claims may be properly dismissed. Saylor v. Valles, 2003-NMCA-037, ¶ 6, 133 N.M. 432 (quoting McCasland v. Prather, 1978-NMCA-098, 92 N.M. 192, 194.) Further, if the allegations in the Complaint are contradicted by any exhibits thereto, the substance of the exhibits controls. *Magnolia Mountain Ltd. Partnership v. Ski Rio Partners, LTD*, 139 N.M. 288, 298 (Ct. App. 2005). This latter point is of importance here given that the Promissory Note (Complaint, Exhibit B) contradicts some of Plaintiff's allegations and thus the Note and not the contrary allegations

control.

Point TWO: All But One of Plaintiff's Claims Are Barred By the Limitations Period

The Promissory Note at issue here is dated September 21, 2009. Complaint, Exhibit B. All of her claims relate to the events that led up to the execution of that Note. As such, we are dealing with a set of facts that is now over 6 years old.

The statutes of limitations are as follows: A) 2 years for Securities claim, Section 58-13B-41, B) 3 years for the Conversion claim, Section 37-1-8 and C) 4 years for the Misrepresentation, Fraud, Breach of Fiduciary Duty and Unfair Practices Act claims, Section 37-1-4. As such, the foregoing claims were barred as of September 21, 2011, 2012 and 2013 respectfully. Though Plaintiff's claim on the Promissory Note is not barred by limitations, it suffers from the opposite effect of being unripe for litigation since the Note has yet to mature. Seven (7) of Plaintiff's eight (8) claims must thus be dismissed on limitations grounds.

The following is presented as alternative and additional grounds for the dismissal of Plaintiff's Complaint in its entirety.

Point THREE: The Claims Against the Individual Defendants Must be Dismissed Because They are Protected From Personal Liability by LLC Law

It is a most basic and fundamental principle of limited liability law that absent exceptional circumstances not alleged nor present here that individual members of a limited liability company are shielded from personal liability. Section 53-19-16. Further, New Mexico statutes expressly state that "[a] member of a limited liability company is not a proper party to a proceeding by or against the limited liability company solely by reason of being a member of the limited liability company, except where the object of the proceeding is to enforce a member's right against or liability to the limited liability company." Section

53-19-14. For these reasons alone, the claims against the individual Defendants should be dismissed.

Further, Defendants Sandoval and Seidelman were not even LLC Members at the time the Note was given. Hanks Affidavit at paragraph 4. As for Seidelman, his interest is owned not by him personally but by his corporation, Entpro. Id. They both should be dismissed under these circumstances.

Hanks also states that he does not believe that Plaintiff has even met Defendants Seidelman, Gonzales and Tessier. Hanks Affidavit at paragraph 5. To the best of Hanks' knowledge, Defendant Sandoval has only met Plaintiff briefly on one or two occasions since the giving of the Promissory Note and on neither of those occasions was the Note even discussed. Hanks Affidavit at paragraph 5. As for Defendant Neriem, his interest in the LLC has been acquired by Defendant Casciani, Hanks Affidavit at paragraph 3, and thus allowing this Court to dismiss Neriem on that basis alone.

To the extent that Plaintiff may seek to rely on some other facts or legal theory to support an argument for individual liability she has failed to set forth any such allegations. In fact, the best she can do is allege that most of the individual Defendants "perhaps" wronged her. Complaint at paragraphs 52 and 57. Lawyers and litigants should not be allowed to sue people on the basis that someone "perhaps" did something wrong. These "perhaps" allegations are such that they also provide grounds for sanctions as is further argued in Section III below.

Point FOUR: The Promissory Note Has Not Matured

In order to properly plead a claim for breach of a promissory note, a plaintiff must allege the following: 1) the existence of a valid note, 2) the passage of the note's maturity

date or due date; 3) demand for payment and 4) lack of payment. Plaintiff's claim must be dismissed because she has failed to show that the note has matured and become due. The Note attached to the Complaint clearly sets forth that the Note is not due until "on or before 30 days from the start of the principal photography of the film CHROME BIKE". Plaintiff's Complaint concedes that this has not yet occurred. The Note cannot possibly be due at this time. To the extent that Plaintiff may seek to rely on some other facts or legal theory to support an argument that the Note is due she has failed to set forth any such allegations. As such, because the Note has not yet matured, Plaintiff's Count I must be dismissed.

Point FIVE: Misrepresentation

To prove a claim for misrepresentation, a plaintiff must prove: 1) a representation of fact was made which was not true; 2) either the falsity of the representation was known to the party making it or the representation was recklessly made; 3) the representation was made with the intent to deceive and to induce plaintiff to rely on the representation; and 4), plaintiff did in fact rely on the representation. *Maxey vs. Quintana*, 499 P.2d 356, 1972 -NMCA- 069. Her allegations merely describe the basic circumstances that led her to loan her money. Those "facts" she claims may support these two claims are such that they are contradicted by the Note. It appears that Plaintiff's main premise for fraud is that she was supposedly told by Defendant Casciani that she would be repaid within a year after the loan. Yet that term never made it into the Promissory Note. Complaint at paragraphs 19, 23 and 26. It can be assumed that the Plaintiff read and had an understanding of the Promissory Note and is bound by its terms after she signed as "Payee". *Morstad v. Atchison, T. & S.F. Ry. Co.*, 23 N.M. 663, 170 P. 886 (1918).

Further, Plaintiff's allegations about misrepresentations that "perhaps" were made

or are "assumed but unknown" cannot possibly serve to support these claims. As noted above, reliance on the representations is an essential element here. How can one rely on events that "perhaps" happened or were "unknown" to her?

Point SIX: Fraud

Fraud is closely related to misrepresentation but involves several more complex elements to be present. Unlike most claims which are subject to notice pleading, claims for fraud, however, must be alleged with particularity. *Maxey* at *Id.* Plaintiff must allege specific and actionable facts, not mere speculations. Plaintiff's Complaint fails miserably in this regard. She merely claims that she has been defrauded in a single paragraph. This does not satisfy the particularity and specificity required for fraud claims and the claim must be dismissed.

Point SEVEN: None of the Defendants Owe Plaintiff Fiduciary Duties

A plaintiff's claim for breach of fiduciary duty must be based on the existence of a fiduciary duty and the breach of said duty. *Walta vs. Gallegos Law Firm PC*, 40 P.3d 449, 2002 -NMCA- 015. The existence of fiduciary duties is the exception and not the rule. Fiduciary duties arise only when there is a special relationship between parties, such as trustee-beneficiary, majority shareholders to minority shareholder or real estate agents to their clients. *Walta* at *Id.* That the parties were involved in a basic commercial or contractual relationship does not give rise to fiduciary duties.

The facts alleged here clearly show that Plaintiff and Defendant Casciani were close friends at the time the loan was made and did not have a special relationship in which fiduciary duties arise. Complaint at paragraphs 9 and 10. While she mentions Defendant Hanks, she provides nothing in the way of stating why he owed her such duties. As for the

other Defendants she does not even allege having met or spoken to them. All she alleges is that the others "perhaps" wronged her. Complaint at paragraphs 52 and 57.

Consideration of basic trustee-beneficiary law makes clear that the relationship and nature of the transaction here do not give rise to any fiduciary duties to Plaintiff. The law of trusts makes clear that the trustee is in charge of funds or other value for the benefit of the beneficiary (thus the common root to the terms benefit and beneficiary). The value at issue here was not for the benefit of Plaintiff. To the contrary, Plaintiff loaned money to FSP not for FSP to hold, manage and distribute for Plaintiff's benefit. As is made clear by her own allegations Defendants would use the monies loaned by Plaintiff to solicit other funding for CHROME BIKE. Complaint at paragraphs 40 c and d. Dismissal of Count IV is thus called for.

Point EIGHT: Money Loaned Under a Promissory Note Here is Not Personal Property and Cannot be Converted

The elements of the tort of conversion are: (1) that the plaintiff had the right of possession of personal property; (2) that the plaintiff demanded that the defendant return the property to plaintiff; and (3) that the defendant refused to return the property to plaintiff. *Nosker v. Trinity Land Co.*, 107 NM 333; see Restatement (Second) of Torts § 237 (1965); 1 F. Harper, F. James & O. Gray, *The Law of Torts* § 2.27 (2d ed. 1986). Plaintiff fails to satisfy the essential element, that of "personal property" in the wrongful possession of another. The claim here is about money that she loaned to FSP. Money such as this does not constitute personal property and cannot be converted.

In *Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696 (E.D. Tex. 2006), the court held that money can be the subject of a conversion only when it is in the form of a specific chattel such as old coins or when the money is delivered to another

party for safekeeping, the keeper claims no title, and the money is required and intended to be segregated either substantially in the form in which it was received or as an intact fund. The court observed that from its nature the title to money passes by delivery and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safekeeping and transmission. Thus, a cause of action for conversion fails when the plaintiff cannot trace the exact funds claimed to have been converted.

Plaintiff's money here was in the form of a loan paid by Cashier's Check. Complaint, Exhibit A. This is not a specifically identifiable chattel. Further, when Plaintiff alleges that her loan was to be used to solicit other funding for the film she acknowledges that her loaned money was to be spent by FSP for its benefit and not hers. That those other purposes included the solicitation of other funding for CHROME BIKE also highlights that the money was to be comingled with other funds and not segregated for the sole benefit of Plaintiff.

Also a claim for conversion is inappropriate when the indebtedness can be discharged by the simple repayment of money. FSP stands ready to pay the Note when it properly matures.

And finally, even if a conversion claim could be asserted here, Plaintiff's claim fails on the same basis as her Promissory Note claim does. Since the Note has not matured, her claim for repayment is premature and she has no right to the return of the money at this time. *Nosker* at Id.

Point NINE: New Mexico Securities Act

The seminal case regarding whether promissory notes are securities under the securities laws is *Reves v. Ernst & Young*, 110 S. Ct. 945 (1990) which recognizes that most promissory notes are not securities and thus not subject to the securities acts. A note secured by a small business or some of its assets is not a security. *Id.* By its express language, the Promissory Note at issue here is indeed secured. The lien language in the Note is as follows: "The obligation to pay money hereunder shall be secured by all of our right, title and interest in and investment in the film CHROME BIKE in which FSP has an interest." Thus, pursuant to *Reves* the Note at issue here is not a security.

Further, most true "securities" are sold as part of an offering of same to the general public or a large group of potential investors. These offerings are usually registered with either or both the Securities Exchange Commission or comparable state agencies. New Mexico Courts have also recognized an exemption to promissory notes being a security. Generally speaking, § 58-13-30(A), *supra*, exempts from the Securities Act "any isolated transaction, whether effected through a broker-dealer or not." Plaintiff makes no allegations that her loan was made as part of an offering. Even in the light most favorable to the Plaintiff, the promissory note is an isolated transaction between the parties and therefore is exempt from the New Mexico Securities Act.

Point TEN: Unfair Practices Act

An "unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Practices Act [57-12-1 NMSA 1978] ("UPA"), a false or misleading oral or written statement, visual description or other representation of any kind knowingly **made in connection with the sale, lease, rental or loan of goods or services or in the**

extension of credit or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person . . . "

Section 57-12-2D. (emphasis added). The statute then goes on to enumerate the conduct that might constitute an unfair or deceptive trade practice. Id. Plaintiff never once cites which of the enumerated acts Defendants have engaged in and so her claim must fail.

Further, FSP is in the business of obtaining funding for and producing motion picture entertainment. The transaction between FSP and Plaintiff was one in which she loaned money to FSP. That transaction did not involve the "sale, lease, rental or loan of goods or services" from FSP to Plaintiff and does not fall within the UPA's coverage. Further, it appears that as a production company FSP is expressly excluded from the UPA. Section 57-12-16 states as follows: "The Unfair Practices Act [Chapter 57, Article 12 NMSA 1978] does not apply to publishers, broadcasters, printers or **other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast or reproduce material without knowledge of its deceptive or unconscionable character.**" (emphasis added)

As such, even if Plaintiff's UPA claim was not barred by the limitations period having run, Plaintiff has not alleged a viable claim under that statute.

SECTION III REQUEST FOR SANCTIONS AND ATTORNEYS' FEES

Had Plaintiff and her counsel researched the applicable limitations periods they would have learned that all but one of her claims are barred.

Had Plaintiff's lawyer done 5 minutes of research she would have learned that members of an LLC are protected from liability.

Had Plaintiff and her counsel read the Promissory Note they would have found out

that it has yet to mature.

Had Plaintiff's counsel researched the law of conversion she would have learned that money such as what Plaintiff loaned FSP cannot be converted.

Had Plaintiff's counsel been more diligent she would have understood that she cannot sue people simply because they "perhaps" wronged her client.

Had Plaintiff's counsel been more diligent she would have understood that she cannot sue people for things that are "assumed but unknown".

All the foregoing is made worse by the fact that Plaintiff and her counsel were warned at least twice of the defectiveness of the claims. The first warning asked them to provide the factual and legal support for her claims since the state of the facts did not support her allegations. FSP warned them that if they proceeded in court that not only would FSP aggressively defend any claims but would also pursue a request for sanctions and attorneys' fees for filing such clearly barred and frivolous claims.

There is an abundance of authority for the imposition of sanctions and attorneys' fees here. First, by its express terms the Promissory Note itself requires that Defendants be awarded their attorneys' fees for defending such a frivolous lawsuit. Complaint, Exhibit B. Anyone who brings a groundless action under the Securities Act will be charged with attorneys' fees and costs. Section 58-13B-40H. Similarly, Section 57-12-10C of the UPTPA requires that the Court award attorneys' fees against a plaintiff and her attorney who brings a groundless action under that statute. And finally, Rule 1-011A calls for sanctions to be imposed when the claims in a pleading are groundless.

SECTION IV
CONCLUSION

Plaintiff's Complaint should be dismissed in its entirety. To summarize:

Count I - Promissory Note: Note has not matured, litigation is premature;

Counts II and III - Misrepresentation/Fraud: Barred by limitations;

Count IV - Breach of Fiduciary Duty; barred by limitations, Plaintiff has failed to allege a valid fiduciary relationship;

Count V - (non-existent);

Count VI - Conversion: barred by limitations, loaned money such as this is not personal property and is not subject to conversion;

Count VII - Securities Act violation: barred by limitations, the promissory note is not a security;

Count VIII - Unfair Practices Act violation: barred by limitations, the transaction at issue here is not subject to the Act.

Count IX - Punitive Damages: Since the foregoing claims are subject to dismissal this claim is also infirm.

Finally, all claims against the individual Defendants are barred because they are insulated from liability by the law of limited liability companies.

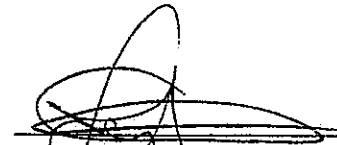
WHEREFORE, Defendants pray this Court to grant relief on the bases hereinabove alleged and stated and grant them the following:

1. Dismiss the Plaintiff's complaint in its entirety;
2. Award the Defendants attorneys' fees and costs pursuant to the attorney's fees provision in the Promissory Note;
3. Award the Defendants attorneys' fees because of having defending this

frivolous complaint;

4. Provide for such other and further relief as the Court may deem just and proper.

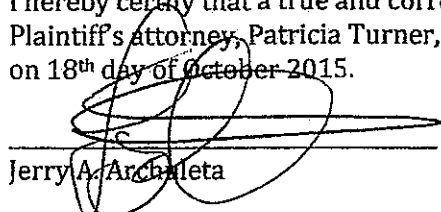
Respectfully submitted,



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Attorney for FSP

I hereby certify that a true and correct copy of the foregoing was mailed to the Plaintiff's attorney, Patricia Turner, P. O. Box 8980, Santa Fe, New Mexico 87504 on 18th day of October 2015.



Jerry A. Archuleta

New Mexico Needs a Feticide Law

by Jerry Archuleta

I. Introduction

Santa Fe resident, Marino Leyba was accused of killing his eight and half months pregnant girlfriend, Sarah Lovato, and her father, Bennie Lovato in May 2009. The shooting raised the controversial question about what a suspect should be charged with when the suspect terminates a viable fetus of a pregnant woman. It is alleged that Leyba's intent was to terminate the fetus in Sarah's stomach. Leyba had made prior statements that Sarah's fetus was not his biological child and Leyba fired the first shot directly into Sarah's stomach, terminating the fetus instantly.¹

New Mexico is one of the few states that has not enacted a statute to address the criminal consequences when a perpetrator violently attacks a woman and causes a termination of a pregnancy, which some other states refer to as feticide or fetal homicide. The current New Mexico homicide, aggravated assault, aggravated battery, aggravated assault against a household member and aggravated battery against a household member statutes deal with the violence against the woman but there is no recognition of the fetus when the woman is pregnant.² There is a federal law that protects a fetus while in the womb³ and several states have adopted some form of a similar law that is frequently referred to as a feticide law (law dealing with the violent termination of a pregnancy).

New Mexico, while continuing to protect a woman's right to abortion, should enact a feticide law that penalizes individuals who injure or cause an unintended termination of a fetus. Many states have recognized the importance of protecting fetuses, thus, they have enacted feticide legislation. Such passage of legislation protecting fetuses has incited much oppression from numerous opposing factions. Opponents worry that such laws would create numerous

¹ AUSLANDER, JASON, *Killing of Fetus sparks debate; Backers of fetal homicide law say they'll push again*, THE NEW MEXICAN, June 6, 2009, at A1.

² See N.M. STAT. ANN. § 30-3-2 (West 2009) (Murder); N.M. STAT. ANN. § 30-2-3 (West 2009) (Manslaughter); N.M. STAT. ANN. § 30-3-2 (West 2009) (Aggravated Assault); N.M. STAT. ANN. §30-5-3 (West 2009) (Aggravated Battery); N.M. STAT. ANN. § 30-13-3 (West 2009) (Aggravated assault against a household member); N.M. STAT. ANN. § 30-16-3 (West 2009) (Aggravated battery against a household member).

³ See Protection of Unborn Children Act, 18 U.S.C. § 1841 (2004).

unintended circumstances, such as outlawing abortion or inappropriately implicating or punishing a pregnant woman who may have a direct or indirect effect on the termination of the pregnancy.

Feticide laws in other states have dealt with these fears by including specific language to protect a woman's abortion rights and specifically exempting the pregnant woman from responsibility of the termination of the fetus.⁴ There is a legal gap in the New Mexico Statutes when dealing with the termination of a fetus. This paper will discuss current New Mexico statutes, the catalyst for a federal feticide law, other states feticide law that protect a fetus, viability of a fetus, the case challenges to the federal and state feticide laws, New Mexico's past attempt at a feticide law, concerns with a feticide law in New Mexico, and reasons why New

⁴ See ALA. CODE § 13A-6-1 (West 2009) (Homicide); ALASKA STAT. § 11.41.140 (West 2009) (Homicide); ARIZ. REV. STAT. ANN. § 13-1102 (West 2009) (Negligent Homicide); ARK CODE ANN. § 5.1.102(13)(B)(i)(a) (West 2009) (Definitions); CAL. PENAL CODE § 187 (a) (West 2009) (Homicide); FLA. STAT. ANN. § 782.09 (West 2009) (Killing of unborn quick child by injury to mother); GA. CODE ANN. § 16-5-80 (West 2009) (Feticide); IDAHO CODE ANN. § 18-4001 (West 2009) (Homicide); ILL. COMP. STAT. ANN. § 5/9-1.2 (West 2009) (Intentional Homicide of Unborn Child); IND. CODE ANN. § 35-42-1-6 (West 2009) (Homicide); KAN. STAT. ANN. § 21-3452 (West 2009) (Application of Certain Crimes to Unborn Children Kansas); KY. REV. STAT. ANN. § 507 (West 2009) (Fetal Homicide); LA. REV. STAT. ANN. § 14:32.5 (West 2009) (General Provisions, Definitions); ME. REV. STAT. ANN. 17-A M.R.S.A. Pt. 2, Ch. 9 (West 2009) (Offenses Against the Person); MD. CODE ANN., CRIM. LAW § 2-103 (West 2009) (Homicide); Commonwealth vs. Lawrence, 536 N.E.2d 571 (Mass. 1973) and Commonwealth vs. Cass, 467 N.E.2d 1324 (Mass. 1984); MICH. COMP. LAWS ANN. § 750.322 (West 2009) (Manslaughter; willful killing of unborn quick child); MICH. COMP. LAWS ANN. § 750.323 (West 2009) (Crimes Against Unborn Children); MINN. STAT. ANN. § 609.266 (West 2009) (Definitions); MISS. CODE ANN. § 97-3-37 (West 2009) (Injury to pregnant woman resulting in miscarriage or stillbirth, "human being" defined: crimes; exceptions); NEB. REV. STAT. ANN. § 28-388 (West 2009) (Homicide of the Unborn Child Act); NEV. REV. STAT. ANN. § 200.210 (West 2009) (Killing of an unborn quick child); N.C. GEN. STAT. ANN. § 14-18.2 (West 2009) (Injury to pregnant woman); N.D. CENT. CODE § 12.1-17.1-01 (West 2009) (Offenses against unborn children); OHIO REV. CODE. ANN. § 2903.01 (West 2009) (Homicide); OKLA. STAT. ANN., CRIM. LAW 21 § 691 (West 2009) (Homicide); PA. CONS. STAT. ANN. 18 § 3203 (West 2009) (Offenses Involving Danger to the Person); R.I. GEN LAWS § 11-23-5 (West 2009) (Willful killing of unborn quick child); S.C. CODE ANN. § 16-3-1083 (West 2009) (Death or injury of child in utero due the commission of violent crime); S.D. CODIFIED LAWS § 22-16-1.1 (West 2009) (Fetal Homicide); TENN. CODE ANN. § 39-13-214 (West 2009) (Criminal Homicide); TEX. PENAL CODE ANN. § 1.07 (Vernon 2009) (Definitions); UTAH CODE ANN. § 76-5-201 (West 2009) (Criminal Homicide); VA. CODE ANN. § 32.1.249 (West 2009) (Definitions and Administrative Provisions); WASH. REV. CODE ANN. § 9.02.170 (West 2009) (Crimes and Punishment, Abortions, Definitions); W. VA. CODE ANN. § 61-2-30 (West 2009) (Recognizing an embryo or fetus as a distinct unborn victim of certain crimes of violence against the person) and WIS. STAT. ANN. § 940.01 (West 2009) (First-degree intentional murder).

Mexico should enact a statute that would punish someone other than the pregnant woman for the termination of a fetus, which will eliminate the legal gaps that currently exist.

II. Current New Mexico Statutes

At this time there is no acknowledgment in the state statutes relating to violence against a person⁵ about the significance or potential of a fetus' future life. New Mexico's homicide statute defines murder as the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused.⁶ A "human being," "another," "person," or "other" as defined by New Mexico statute is any other human being or legal entity, whether incorporated or unincorporated including the United States, the state of New Mexico or any subdivision thereof.⁷ The New Mexico criminal statutes do not currently recognize a fetus as a human being, another, or person. The only place a fetus is defined is in New Mexico abortion laws.⁸

A fetus is defined as the biological offspring of human parents in the Partial Abortion Ban Act.⁹ While a viable fetus is discussed in the partial abortion ban statute, the statute does not provide any meaning of a viable fetus. The statute only uses the term "independently viable fetus." The term independently viable fetus is not clearly defined. The term "independently" could mean without any medical intervention. As such, an independently viable fetus may be interpreted to mean that the fetus must survive without the use of advanced medical intervention to be considered viable.

⁵ See N.M. STAT. ANN. § 30-2-1 (West 2009) (Murder); N.M. STAT. ANN. 30-2-3 (West 2009) (Manslaughter); N.M. STAT. ANN. § 30-3-2 (West 2009) (Aggravated assault); N.M. STAT. ANN. § 30-3-5 (West 2009) (Aggravated battery); N.M. STAT. ANN. § 30-3-16 (West 2009) (Aggravated assault against a household member); N.M. STAT. ANN. § 30-3-16 (West 2009) (Aggravated battery against a household member).

⁶ N.M. STAT. ANN. § 30-2-1 (West 2009) (Murder).

⁷ N.M. STAT. ANN. § 30-1-12 (D), (E) (West 2009) (General Provisions, Definitions).

⁸ N.M. STAT. ANN. § 30-5-1 (West 2009) (Abortion, Definitions).

⁹ N.M. STAT. ANN. § 30-5A-2 (West 2009) (Abortion, Persons and institutions exempt).

The legal justifications for termination of a pregnancy are defined under the New Mexico abortion laws. The termination of a fetus is legal under the New Mexico abortion statute prior to twelve weeks of gestation.¹⁰ Past twelve weeks of gestation a fetus may be still be terminated for justified medical reasons. The statute sets forth justified medical terminations for when a legal abortion may be performed.¹¹ It is justified to medically terminate a fetus at any stage of the pregnancy when the pregnant woman's life is at risk or the child will probably have a mentally or physically deprived life. Even a viable fetus may be terminated under certain circumstances.¹²

The only criminal act pertaining to an unwanted termination of pregnancy in New Mexico is the criminal abortion statute. Criminal abortion consists of "administering to any pregnant woman any medicine, drug or other substance, or using any method or means whereby an untimely termination of her pregnancy is produced, or attempted to be produced, with the intent to destroy the fetus, and the termination is not a justified medical termination".¹³ Under this statute anyone, including the pregnant woman, could be charged with criminal abortion. The criminal abortion statute addresses the crime against pregnant women, but it is silent about the possible crime or termination of the fetus of the pregnant woman by another person. Other states have enacted statutes outside of abortion statutes to deal with acts against the fetus.

III. Catalyst for a Federal Feticide Law

On August 18, 2003, Scott Peterson was arrested for the murder of his wife, Laci Peterson, while she was eight months pregnant with a male fetus.¹⁴ Mr. Peterson's arrest showcased the fact that there was no law to deal with harming a fetus while still in the womb.

As a response to this issue the federal government enacted the Protection of An Unborn Child

¹⁰ See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 596 (4th ed. 2008). ("Gestation – 1. the act or period of carrying young in the uterus from conception to birth, pregnancy").

¹¹ See N.M. STAT. ANN. § 30-5-1 (West 2009) (Justified medical termination).

¹² See N.M. STAT. ANN. § 30-5-1 (C) (West 2009) (Abortion definitions for justified termination of pregnancy).

¹³ See N.M. STAT. ANN. § 30-5-3 (West 2009) (Criminal Abortion).

¹⁴ Fox News, Timeline: The Laci Peterson Case, <http://www.foxnews.com/story/0,2933,84572,00.html> (2004).

Act¹⁵ that went into effect on April 1, 2004. As a consequence of the federal law, a suspect can be charged with double homicide for murdering a pregnant woman because the fetus can be considered a victim of the crime.

The constitutionality of the federal statute has been tested in federal courts and United States Supreme Court. In *Gonzales v. Planned Parenthood Federation of America* the United States Supreme Court stated, “that criminal penalties for killing a fetus have existed for centuries, dating back to ancient Persia”.¹⁶ Furthermore the Court stated that “criminal penalties for unborn was not a recent phenomenon.”¹⁷ The Court concluded that it was “widely established that unborn children may be treated as distinct individuals deserving of legislative protection”.¹⁸

The United States District Court has recognized a fetus as a “person” as an element of an aggravating federal charge. In *United States v. Montgomery*, the defendant, Lisa Montgomery, motioned the United States District Court to drop an aggravating factor of death while committing kidnapping when Montgomery allegedly used a large knife to cut the fetus out Bobbie Jo Stinnett’s stomach causing the death of Stinnett.¹⁹ Montgomery challenged the fetus being considered a “person” for purposes of federal criminal laws in light of the findings by the United States Supreme Court beginning in *Roe v. Wade*.²⁰ The Court stated that the states as well as the federal government could assert an interest in an unborn fetus while not interfering with a woman’s right to abortion afforded in *Roe v. Wade*.²¹

¹⁵ See Protection of Unborn Children Act 18 U.S.C. § 1841 (2004).

¹⁶ *Gonzales v. Planned Parenthood Federation of America*, No. 05-1382, 2006 WL 2282552 *5 (Aug. 3, 2006).

¹⁷ *Gonzales v. Planned Parenthood Federation of America*, No. 05-1382, 2006 WL 2282552 *6 (Aug 3, 2006).

¹⁸ *Gonzales v. Planned Parenthood Federation of America*, No. 05-1382, 2006 WL 2282552 *8 (Aug 3, 2006).

¹⁹ *United States v. Montgomery*, No. 05-6002-CV-SJ-GAF, 2007 WL 2711511 *1 (W.D. Mo. Sept. 13, 2007).

²⁰ *United States v. Montgomery*, No. 05-6002-CV-SJ-GAF, 2007 WL 2711511 *2 (W.D. Mo. Sept. 13, 2007).

²¹ *United States v. Montgomery*, No. 05-6002-CV-SJ-GAF, 2007 WL 2711511 *2 (W.D. Mo. Sept. 13, 2007).

The federal government recognized that there was a gap in the federal law when Laci Peterson was murdered while pregnant. The gap in the law allowed violent attacks against a fetus while in the woman's womb to go criminally unpunished. In response to the gap in the federal law, the federal government responded by enacting the federal feticide law to protect a fetus. The federal feticide law restricts the state's local law enforcement officers to only federal court. The federal feticide-type law also requires that another federal crime must be committed to charge someone with feticide. The requirements and structure of the federal feticide law are not tailored to the needs of individual states. That is why some many states have created their own feticide-type laws.

IV. Other States Feticide Laws

Several states followed the federal feticide law to create state laws to protect the fetus of a pregnant woman from violent attacks from another person. The structure of the state feticide law is similar to the federal feticide law. The amount of protection that the states have applied to the fetus of a pregnant woman has varied from the federal feticide law. Each of these states that have some type of feticide law have justified the enactment of the statutes under the state's police power to protect citizens of the state. These states that have feticide laws have all come to the conclusion that a state has a compelling interest in protecting the potential life of a fetus and such interest needs to be protected by these states.

There are currently thirty-six states that have statutes that deal with death of a fetus.²² The point of determination of when the fetus is protected ranges from the point of conception of

²² Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

the fetus to a point of viability of the fetus. There are nineteen states²³ that define the fetus as an "unborn child or quick child" and as a member of the species *Homo sapien* at any stage of development that is carried in the womb. The standard set by these nineteen states is the most stringent standard to be set pertaining to the death of a fetus. These nineteen states use the point of conception to define when a fetus may be protected by law.

Rather than using the point of conception as the beginning point of protection for the fetus, the other seventeen states have used a different standard that is similar to the viability of the fetus.²⁴ For the other states that have feticide laws the point of conception is too early in the gestation period to acknowledge a fetus as a victim. The other states use viability of the fetus as the point to begin protection of the fetus. The majority of states that do not recognize a fetus upon conception as a life protected under the law use the term viability without any specific time indication in the pregnancy.²⁵

Arkansas does not use the point of conception nor viability as the determining point of when to protect a fetus. In Arkansas the statute states a gestation period of twelve weeks or greater is the determining factor of when the statute protects the fetus. While identifying a specific time of protection for the fetus the Arkansas statute does not define viability of a fetus. Of the seventeen states with feticide laws that do not use the point of conception as the determining point for protection of the fetus none of these states define viability. Arkansas is the only state that does not use the point of conception or viability as the determining factor of when the law will protect a fetus.

²³ Alabama, Arizona, Arkansas, Georgia, Idaho, Illinois, Kansas, Louisiana, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, West Virginia and Wisconsin.

²⁴ Alabama, Arizona, Arkansas, Georgia, Idaho, Illinois, Kansas, Louisiana, Minnesota, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, West Virginia and Wisconsin.

²⁵ Arkansas is the only viability state that specifies a specific point in the pregnancy when the feticide law can be used to prosecute someone.

V. Viability

Medical viability occurs when the critical organs of the fetus, such as the lungs and kidneys, are developed enough to function either with or without medical attention. Generally, around week twenty-four a fetus could be born and survive with proper care, but this varies with each pregnancy.²⁶ Some babies have survived prior to the twenty-four weeks of gestation mark. Babies have been known to survive at twenty-two weeks and earlier, although twenty-three weeks is generally considered the threshold of viability in the United States, where there exists superior neonatal technology compared to third world countries.²⁷

At twenty-four weeks, healthy babies born to healthy mothers are considered to have reached the medically accepted point of viability in the medical community worldwide.²⁸ The twenty-fourth week of gestation is not a uniform time when the states that use viability as the point when the fetus is acknowledged. Some of the states do make note of a specific time in the gestation of the pregnancy of when the state recognizes the fetus as viable. Instead of an exact point of gestation to determine when to protect a fetus, some states have used case law to determine when a fetus would be recognized as a victim.²⁹

Jerold Taitz and Sheila Claw define the beginning viable point of a fetus depending on medical assistance as the twelve-week mark in the gestational period.³⁰ The viability definition by Taitz and Claw states that a further consideration is that a fetus of five-and-a-half months (twenty-four weeks' gestation) may survive minutes, hours or days after complete birth. In

²⁶ Telephone interview with Dr. Jack Kent, General Practitioner, Nov. 30, 2009.

²⁷ Telephone interview with Dr. Jack Kent, General Practitioner, Nov. 30, 2009.

²⁸ Telephone interview with Dr. Jack Kent, General Practitioner, Nov. 30, 2009.

²⁹ See, e.g., *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1973); *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984).

³⁰ JEROLD TAITZ and SHEILA CLAW, Commentary, *MEDICOLEGAL MATTERS, EFFECT OF THE LEGISLATIVE DEFINITION OF THE TERMS 'STILLBORN' AND VIABLE', A MEDICOLEGAL IMPASSE*, <http://www.ncbi.nlm.nih.gov/pubmed/3340967> (1998).

medical terms, such a fetus is viable.³¹ Some states do not use a medically determined point of gestation period to begin the protection of a fetus.

Although Massachusetts's statutes do not define the point of when a fetus should be protected by law, the Supreme Judicial Court of Massachusetts has addressed the issue of a fetus as a separate victim of a crime. In *Commonwealth vs. Lawrence* the court affirmed the defendant's conviction for murder of a woman and involuntary manslaughter of her twenty seven week old fetus.³² In *Commonwealth vs. Cass* the court ruled that a viable fetus was a person for purposes of vehicular homicide statute.³³ These court cases have recognized a viable fetus as a victim similar to feticide laws of other states. Although in *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Supreme Court was addressing a Pennsylvania statute's undue burden on abortion, the Court stated that state protection for the fetus at viability was constitutional.³⁴

VI. Court Challenges State to Feticide Laws

Several states with feticide laws already had the feticide laws challenged in the states' higher courts. The higher courts have confirmed the fetuses as a victim for purposes of criminal law. These decisions have raised important questions about feticide: when a fetus is viable, whether a fetus is equivalent to a "person" for purposes of criminal law, the extent to which laws can protect a fetus, and whether it is constitutional to protect a fetus.

California determined that a fetus could be included in the California homicide statute. In *People v. Davis*³⁵ the California Supreme Court upheld the legislature's addition of the phrase "or a fetus" to the state murder law in 1970 for the purposes of a fetus being a victim of

³¹ JEROLD TAITZ and SHEILA CLAW, Commentary, *MEDICOLEGAL MATTERS, EFFECT OF THE LEGISLATIVE DEFINITION OF THE TERMS 'STILLBORN' AND VIABLE', A MEDICOLEGAL IMPASSE*, <http://www.ncbi.nlm.nih.gov/pubmed/3340967> (1998).

³² 536 N.E.2d 571 (Mass. 1973).

³³ 467 N.E.2d 1324 (Mass. 1984).

³⁴ 505 U.S. 833 (1992).

³⁵ 872 P.2d 591 (Cal. 1994).

murder.”³⁶ In *People v. Dennis* the California Supreme Court upheld inclusion of fetal homicide under Penal Code 190.2(3), which makes a defendant eligible for capital punishment if convicted of more than one murder.³⁷ The “death” or termination of a fetus could be considered as a second murder victim that could make the defendant eligible for capital punishment.

In Georgia a defendant challenged whether the state’s feticide law was too vague to be constitutional.³⁸ Defendant Richard James Smith, Sr., was convicted in state court of killing a pregnant woman, which resulted in the termination of the pregnancy, during an armed robbery. After Smith was convicted he filed for a writ of habeas corpus with Georgia Superior Court. Smith was denied habeas corpus from Superior Court so he appealed to the United States Court of Appeals for the Eleventh Circuit. A three-judge panel of the United States Court of Appeals for the Eleventh Circuit unanimously upheld the conviction of Richard James Smith, Sr., under Georgia’s “feticide” statute. Smith argued that the law conflicted with *Roe v. Wade*, but the court rejected this assertion as “without merit”.³⁹ The court held that the proposition that Smith relied upon in *Roe v. Wade* - that an unborn child is not a “person” within the meaning of the Fourteenth Amendment - was simply immaterial to the question of whether a state can prohibit the destruction of a fetus.⁴⁰

In Missouri there is a statute that declares a fetus is a person entitled to protection by all state laws from conception.⁴¹ In the 1989 case of *Webster v. Reproductive Health Services* the

³⁶ California Penal Code 187(a) defines murder as the “unlawful killing of a human being, or a fetus, with malice aforethought”.

³⁷ 950 P.2d 1035 (Cal. 1994).

³⁸ *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

³⁹ *Id.* at 1388.

⁴⁰ *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987).

⁴¹ MO. ANN. STAT. § 1.205.1 (West 2009) declaring that the “life of each human being begins at conception and that unborn children have protectable interests in life, health, and well-being and that all state laws shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state”.

United States Supreme Court refused to invalidate the Missouri statute.⁴² A lower court in this case held that Missouri's law impermissibly adopted a theory of when life begins, but the Supreme Court nullified this ruling, and held that a state is free to enact laws that recognize unborn children as persons, so long as the state does not include restrictions on abortion that *Roe* forbids.⁴³

In Pennsylvania the Unborn Child Protection Act was challenged based on definition of viability of the fetus. In *Commonwealth of Pennsylvania v. Bullock* the Pennsylvania Supreme Court unanimously rejected an array of constitutional challenges to the Crimes Against the Unborn Child Act,⁴⁴ including claims based on *Roe v. Wade* and equal protection doctrine. Although the Crimes Against the Unborn Child Act applies from fertilization until birth,⁴⁵ in *Commonwealth v. Bullock* the defendant, Matthew Bullock, argued that United States Supreme Court precedents allowed such a law to apply only after the point that the fetus was viable. The Pennsylvania Supreme Court justices rejected the argument, stating that "to accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend on external conditions, namely, the state of medical technology (which, of course, tends to improve over time.)"⁴⁶ The justices further stated that viability outside of the womb is immaterial to the question of whether the defendant's actions have caused a cessation of the biological life of the fetus.⁴⁷

In 2006 a defendant challenged the constitutionality of the Texas 2003 Prenatal Protection Act.⁴⁸ In *Terence Chadwick Lawrence v. the State of Texas*, the Texas Court of

⁴² 492 U.S. 490 (1989).

⁴³ 492 U.S. 490 (1989).

⁴⁴ 18 PA. CONS. STAT. ANN. § 2601 (West 2009).

⁴⁵ 18 PA. CONS. STAT. ANN. § 2601 (West 2009).

⁴⁶ 590 Pa. 480, 913 A2d 207.

⁴⁷ 590 Pa. 480, 913 A2d 207.

⁴⁸ *Terence Chadwick Lawrence v. the State of Texas*, 204 S.W. 3d 912 (Tex. 2006).

Criminal Appeals unanimously rejected the defendant's claims that the 2003 Prenatal Protection Act was unconstitutional for various reasons, including inconsistency with *Roe v. Wade*.⁴⁹ After learning that a girlfriend, Antwonya Smith, was pregnant with his child, defendant Lawrence "shot Smith three times with a shotgun, causing her death and the death of her four-to-six week old embryo."⁵⁰ Lawrence was convicted of the offense of "capital murder," defined in Texas law as causing the death of "more than one person during the same criminal transaction."⁵¹ The court said that the abortion-related rulings of the U.S. Supreme Court have "no application to a statute that prohibits a third party from causing the death of the woman's unborn child against her will." The court noted, "Indeed, we have found no case from any state supreme court or federal court that has struck down a statute prohibiting the murder of an unborn victim, and appellant [Lawrence] cites none".⁵²

In Utah a defendant challenged the state's feticide law because "unborn child" was not defined. In *State of Utah v. MacGuire* the defendant, Roger Martin MacGuire, argued that the law, which covered the death of another human being, including an unborn child, was unconstitutional because the term unborn child was not defined.⁵³ MacGuire was charged with aggravated murder for allegedly killing his former wife and her unborn child.⁵⁴ The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero."⁵⁵ The state's aggravated murder statute applies a more severe penalty for a crime in which two or more

⁴⁹ 204 S.W. 3d 912 (Tex. 2006).

⁵⁰ *Id.* at 917.

⁵¹ *Id.* at 918.

⁵² *Id.* at 924.

⁵³ 84 P.3d 1171 (Utah 2004).

⁵⁴ *Id.* at 1711.

⁵⁵ *Id.* at 1173.

"persons" are killed. The court ruled that this law was also properly applied to an unborn victim and was consistent with the United States Constitution.⁵⁶

Even though state feticide laws have been upheld by the United States Supreme Court and several state courts there are still fifteen states, including New Mexico, that do not have any type of protection for a fetus in the womb.⁵⁷ These fifteen states only protect the pregnant woman from any violent attack but do not add any additional charge for harming the fetus. It seems improbable for a pregnant woman to lose her fetus without the loss causing her greater and more intense emotional pain. New Mexico has tried to deal with the issue of violent attacks against pregnant women by attempting to pass a bill to protect the fetus.

VII. New Mexico Unborn Victims of Violence House Act

In 2005 State Representative Larry Larranaga proposed House Bill 111 to the 47th New Mexico Legislature in an effort to protect fetuses from violent acts.⁵⁸ The Unborn Victims of Violence Act (UVVA) sought to prohibit violent crimes against pregnant women and impose penalties for intentional murder, voluntary manslaughter, involuntary manslaughter, and battery on an "unborn child." The UVVA would not have applied to legal abortion, self-induced abortion, acts in accordance with customary medical procedure, and acts committed in self-defense. With the UVVA, the knowledge of pregnancy was not necessary by the person committing the act of violence for that person to be charged with a crime. The UVVA possessed similar elements of the surrounding states that had already enacted feticide type laws at the earliest stage possible of conception.

⁵⁶ *Id.* at 1176.

⁵⁷ Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, and Wyoming.

⁵⁸ H. B. 111, New Mexico Unborn Victims of Violence House Act, 47th Sess. (2005).

The UVVA defined who was to be protected.⁵⁹ The UVVA defined “another” to include an unborn child or human being other than the actor, an “unborn child” as a child in utero, a “child in utero” as a member of the Homo sapiens species at any stage of development that is carried in the womb, and “whoever” as a person other than the pregnant woman whose unborn child is injured or killed.⁶⁰ The point of protection for the state would have been from the point of conception under the UVVA, similar to the other nineteen states that protect a fetus upon conception.

The next element in the UVVA that was similar to the earliest protection states was that the UVVA did not require knowledge by the perpetrator or perpetrators that the woman was pregnant. The bill stated an offense under the UVVA did not require proof that the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or that the defendant intended to cause the death of, or bodily injury to, the unborn child.⁶¹

The last similar element to earliest protection states was the penalty section of the bill. The penalty section of the bill classified the varying degrees of offenses against a fetus from murder to involuntary manslaughter. The penalties for violent acts against a fetus were exactly the same for the same violent acts against a human being.

The UVVA had exceptions to criminal prosecution that differed from the exceptions of the earliest protection states. The exceptions were acts committed by a pregnant woman with respect to her own “unborn child” acts that were committed pursuant to usual and customary

⁵⁹ H. B. 111, New Mexico Unborn Victims of Violence House Act, 47th Sess. (2005).

⁶⁰ H. B. 111, New Mexico Unborn Victims of Violence House Act, 47th Sess. (2005).

⁶¹ H. B. 111, New Mexico Unborn Victims of Violence House Act, 47th Sess. (2005).

standards of medical practice during diagnostic testing or therapeutic treatment, or acts involving the use of force in lawful self-defense or lawful defense of another.⁶²

Despite the numerous similarities to feticide type laws enacted in neighboring jurisdictions, the UVVA was tabled and therefore never voted on by the legislators.⁶³ State Representative Larranaga stated that he has been approached by Sarah Lovato's family to reintroduce a bill to protect a fetus while in the woman's womb from a violent attack.⁶⁴

VIII. Concerns with a Feticide Law in New Mexico

Concerns surrounding a feticide-type law in New Mexico are that the law would be used to outlaw otherwise legal abortions and that the law would shift the focus from the woman being the victim to the fetus being a "victim" and undermine domestic violence laws and efforts to end domestic violence.⁶⁵

The National Network to End Domestic Violence in a memorandum titled *The Unborn Victims of Violence Act* raised concerns from the group that the UVVA would harm the domestic violence movement rather than help it.⁶⁶ The memorandum explained that the UVVA would do little to address violence against women, will be used to eliminate a women's right to a legal abortion, and does not fully account for the true nature of battering situations.⁶⁷

Another concern is that the pregnant woman could be criminally charged for causing the termination of the pregnancy. The feticide laws of other states have protected the pregnant woman from criminal prosecution when the pregnant woman has a direct or indirect effect on the termination of the pregnancy. An example of a direct effect would be if the woman carrying the

⁶² H. B. 111, New Mexico Unborn Victims of Violence House Act, 47th Sess. (2005).

⁶³ Interview with Larry Larranaga, State Representative, Oct. 15, 2009.

⁶⁴ Interview with Larry Larranaga, State Representative, Oct. 15, 2009.

⁶⁵ Interview with Sharon Pino, New Mexico Domestic Violence Czar, Sept. 21, 2009.

⁶⁶ Memorandum from the National Network to End Domestic Violence, *The Unborn Victims of Violence Act* (undated).

⁶⁷ Memorandum from the National Network to End Domestic Violence, *The Unborn Victims of Violence Act* (undated).

fetus violently terminated the pregnancy by blunt force to her stomach or internally. An indirect termination of a pregnancy could occur as a result of chemical dependency; such as alcohol, prescribed medications, or illegal drugs. Once the concerns of a feticide-type law have been identified, changes could be made to the past UVVA to address these concerns.

IX. Proposed Changes

While these are critical concerns, a feticide-type law could be drafted that would complement the domestic violence movement rather than harm it. A different feticide-type law would not directly deal with the violence against the women because there are statutes like battery and assault statutes that already address the violence against the pregnant women. A new feticide-type law could complement domestic violence efforts like conspiracy laws complement other felonies.⁶⁸ A new feticide-type law could also protect a woman's right to abortion with an exception to the feticide-type law that would not allow any interference with a woman's legal right to an abortion.

In *Roe v. Wade*, the Court discussed when a state acknowledges an interest in an unborn fetus. The Court defined terms pertaining to a fetus.⁶⁹ The Court stated that medically, the term "embryo" referred to the organism from conception through the first three months of gestation, the term "fetus" referred to the organism from the end of the first three pre-natal months until birth, and the term "conceptus" covers in utero being through all stages of pregnancy.⁷⁰ The Court wished to settle the question of when a fetus became a "person" within the terms of the

⁶⁸ When more than one suspect is engaged in felonious activities, the suspects are charged with conspiracy along with whatever other felony was committed. The conspiracy charge does not detract from the other felony. Rather the conspiracy charge deals with the issue of more than one suspect planning the felonious act or acts.

⁶⁹ 410 U.S. 113 (1973).

⁷⁰ 410 U.S. 113 (1973).

due process clause of the Fourteenth Amendment, and is so entitled to the constitutional protections afforded any other citizen.⁷¹

The Court considered the relationship between the pregnant woman and fetus. The Court determined that the fetus could not survive and develop into a separate self-sustaining person without contribution of the bodily force of the single female individual who carried that particular fetus within her body. The Court used a comparison of the pregnancy relationship to that of a donor and donee. The Court stated that there was no superior right of either to compel the other to act in any way.⁷²

The right of the pregnant woman and the state's interest of a fetus are established in common law. Protection of a fetus has its roots in common law for reasons of increasing population of soldiers for battle. Abortion was not a crime at common law unless induced after the fetus had "quickened," *i.e.*, moved in the womb.⁷³ Abortion prior to quickening was outlawed and punished as crime in France, England and the United States at the time when those countries required people/citizens for armies, settling or colonization, with the harshest anti-abortion laws existing in societies with an overriding interest in producing soldiers for military conquest.⁷⁴

Viability of the fetus should not be interpreted to give a viable fetus all rights guaranteed under the Constitution. Since viability is only a determination of the possible survival of the fetus and not a guarantee of a live birth, it should only be used as a determining factor when the statute begins to acknowledge a fetus as viable for purposes of prosecution against someone who commits a violent act against the pregnant women.

⁷¹ 410 U.S. 113 (1973).

⁷² 410 U.S. 113 (1973).

⁷³ ROLLINS PERKINS, *CRIMINAL LAW* 29-30 (Foundation Press) (2d ed. 1957).

⁷⁴ *SEE* LEAVY AND KUMMER, *CRIMINAL ABORTION: HUMAN HARDSHIP AND UNYIELDING LAW*, 35 S. CAL. L. REV. 123 (1962); MEANS, *THE LAW OF NEW YORK CONCERNING ABORTION AND THE STATUS OF A FETUS, 1664-1968: A CASE STUDY OF CESSATION OF CONSTITUTIONALITY*, 14 N.Y.L.F. 411 (1968).

The current New Mexico statutory definition of viability comes from New Mexico Maternal, Fetal, and Infant Experimentation Definitions pertaining to statistical data management.⁷⁵ The statute defines viability “of that stage of fetal development when the unborn child is potentially able to live outside the pregnant woman's womb, albeit with artificial aid”.⁷⁶ A fetus means “the product of conception from the time of conception until the expulsion or extraction of the fetus or the opening of the uterine cavity, but shall not include the placenta, extraembryonic membranes, umbilical cord, extraembryonic fluids and their resident cell types and cultured cells”.⁷⁷ There are no New Mexico cases that deal with viability of fetus but there is medically accepted twenty-four week gestation period as the point of viability.⁷⁸

New Mexico should only use the recognition of viability for purposes of the criminal prosecution under the feticide law and maintain the term “viable or viability” to be consistent with the other states that already have feticide laws. The definition of viability for purposes of a criminal law should not be applied to statistical data collection. Once viability is determined, New Mexico must determine the state’s interest in the fetus.

X. Feticide Law in New Mexico

New Mexico should introduce a new feticide bill to protect a fetus from violent attacks from someone other than the pregnant woman. The new bill could address the concerns of the past New Mexico feticide bill. The new bill could retain portions of the UVVA that are similar to feticide-type laws of other states. The new bill could also include exceptions that the UVVA did not have to protect pregnant women from criminal and civil liability from acts caused by the pregnant woman.

⁷⁵ N.M. STAT. ANN. 24-9A-1 (West 2009) (Maternal, Fetal, and Infant Experimentation; Definitions).

⁷⁶ N.M. STAT. ANN. 24-9A-1 (West 2009) (Maternal, Fetal, and Infant Experimentation; Definitions).

⁷⁷ N.M. STAT. ANN. 24-9A-1 (West 2009) (Maternal, Fetal, and Infant Experimentation; Definitions).

⁷⁸ N.M. STAT. ANN. 24-9A-1 (West 2009) (Maternal, Fetal, and Infant Experimentation; Definitions).

The new bill should state that the perpetrator or perpetrators do not have to possess knowledge of the pregnancy. The reasoning for maintaining this section is because current violent crime statutes, such as homicide and manslaughter, do not require the perpetrator or perpetrators to identify the exact physical and mental injuries that might be caused by the violent action or actions. The current violent crime statutes focus on the intent to cause harm by the perpetrator/s and the ending result injury.

The new bill should also include exemptions to criminal prosecution. One of the exceptions of the bill is that it should not be used to prosecute the woman carrying the fetus for any intentional or unintentional harm caused by the woman carrying the fetus. A woman carrying the fetus should not be prosecuted for the “death” of an “unborn child”.

The reason to exclude the pregnant woman from prosecution is because there are some known effects of pregnancy that change a woman’s behavior. Some psychological effects are feelings of depression, self-esteem issues, body image issues and personal feelings regarding control.⁷⁹ There are also physical effects that contribute to the psychological effects. Some of the physical effects of pregnancy are exhaustion, altered appetite and senses of taste and smell, nausea and vomiting, heartburn and indigestion, constipation, and weight gain.⁸⁰ There is too much conflicting medical evidence as to the physical and emotional changes that pregnancy causes in women to justify inclusion in possible criminal actions. The psychological and physical effects caused by pregnancy could diminish any mens rea necessary for intent in criminal actions and accountability necessary for civil liability.

⁷⁹ Pregnancy and Birth - Physical and Psychological Changes of Pregnancy, <http://family.jrank.org/pages/1318/Pregnancy-Birth-Physical=Psychological-Changes-Pregnancy.html> (last visited on Feb. 10, 2010).

⁸⁰ Pregnancy and Birth - Physical and Psychological Changes of Pregnancy, <http://family.jrank.org/pages/1318/Pregnancy-Birth-Physical=Psychological-Changes-Pregnancy.html> (last visited on Feb. 10, 2010).

The next exemption of a new bill pertains to the right of a pregnant woman in obtaining a legal abortion as defined in the abortion statute.⁸¹ The bill should not contradict a woman's legal right to an abortion in New Mexico. Other states have successfully protected a woman's right to an abortion with an abortion exception clause in the feticide law.

The new bill should not prohibit a pregnant woman or her provider from administering proper medical care in fear of being prosecuted under the bill. The offense of feticide should not include acts which cause the termination of the fetus if those acts were committed during any abortion to which the pregnant woman or her legal guardian has consented or which was performed in an emergency. Nor should the offense of feticide include acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment. This issue could be covered with a "medical justification clause" similar to that in other feticide-type law states.

XI. Conclusion

New Mexico should adopt a feticide law that acknowledges the state's interest in the life of a viable fetus. New Mexico should adopt this law for the moral reasoning that New Mexico needs to recognize that the current state statutes do not address the issue when the development of a fetus into a life is terminated during a violent act against the pregnant woman with the fetus in the womb. The current state statutes deal with the injury to the pregnant woman, but there is no statute that addresses any harm that is caused to the fetus of the pregnant woman. There is a gap in the law that needs to be identified to protect the relationship between the pregnant woman and the fetus. Furthermore a feticide-type law could protect the state's interest in the future life.

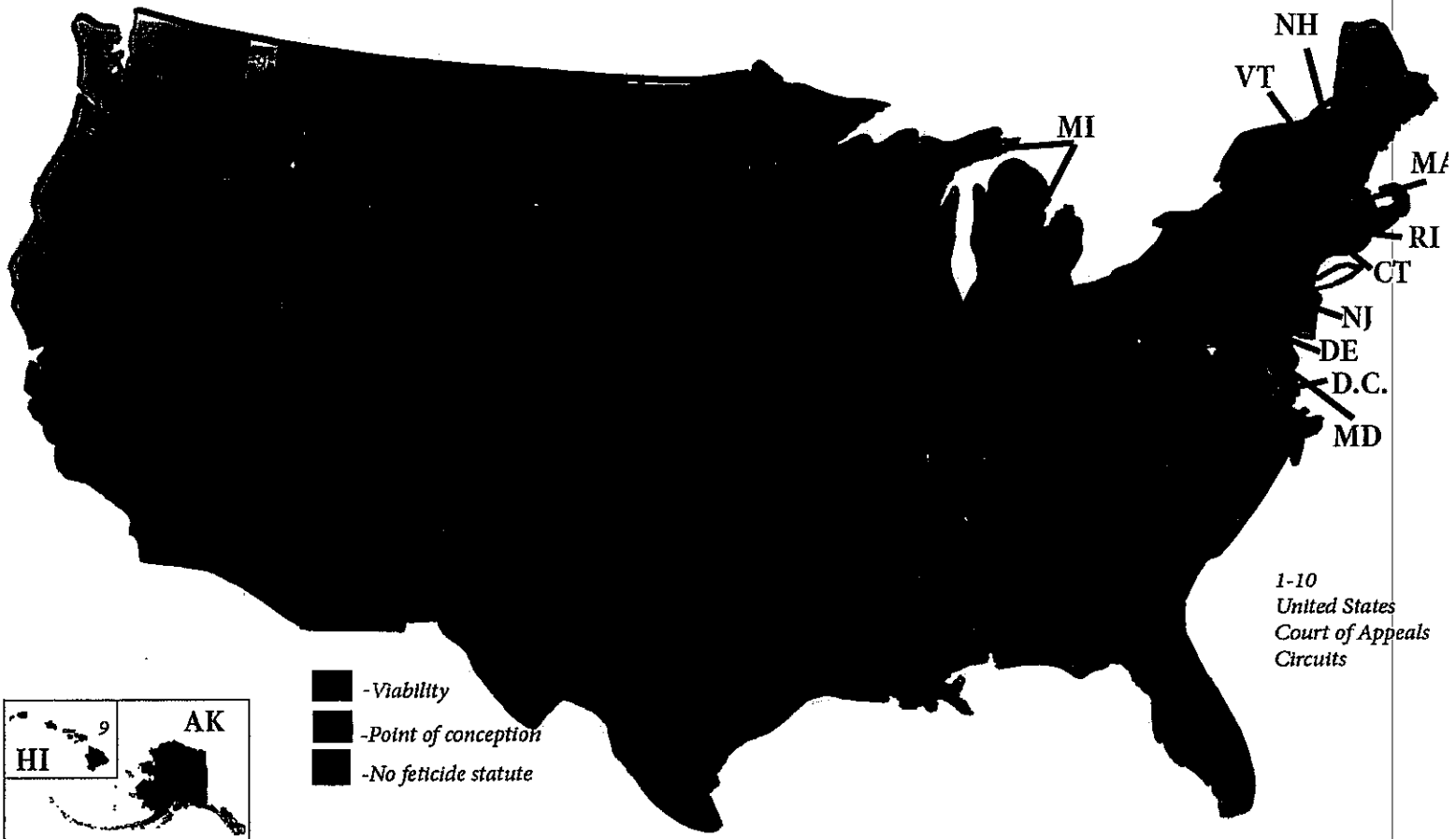
The significant relationship between the pregnant woman and the fetus should be addressed to protect both the pregnant woman and the fetus. The majority of states in the United

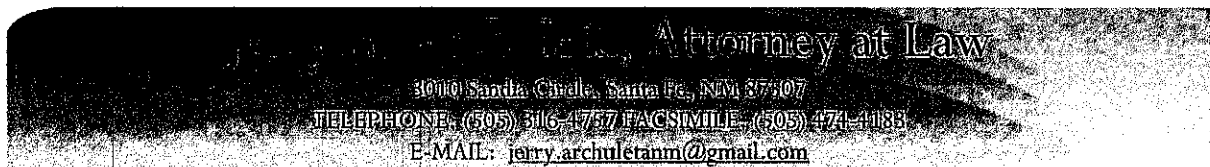
⁸¹ N.M. STAT. ANN. § 30-5-1 (West 2009) (Abortion).

States and the federal government has recognized this need and has made changes to their laws to address this issue. Rather than rely on federal law, New Mexico should take the initiative to protect the state's interest in the fetus and in turn protect the interest of pregnant women in New Mexico from violent attacks. The ethical reasoning to adopt a feticide law is because assault against a pregnant woman does not ethically address the mental and physical effects of losing the fetus.⁸² New Mexico should use viability of the fetus as the determining factor of when the law should protect the fetus by criminal prosecution because there is a greater likelihood of survival of the fetus outside the pregnant woman's womb.

⁸² Pregnancy and Birth - Physical and Psychological Changes of Pregnancy, <http://family.jrank.org/pages/1318/Pregnancy-Birth-Physical=Psychological-Changes-Pregnancy.html> (last visited on Feb. 10, 2010).

Feticide Statute Map





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